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No. 81-2318

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF FLORIDA,

Petitioner,

v.

CONSTANTINO CASAL and OMAR GARCIA,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

I. IS THE FLORIDA MARINE PATROL LAWFULLY PERMITTED TO MAKE A RANDOM STOP OF A MOTOR VESSEL THAT IS NOT OBSERVED TO BE VIOLATING ANY LAW NOR TO BE ENGAGED IN ANY SUSPICIOUS ACTIVITY WHEN THE PURPOSE OF STOPPING THE MOTOR VESSEL IS TO CHECK IF THE BOAT HAS ITS REGISTRATION PAPERS ON BOARD?

II. WAS THE FLORIDA MARINE PATROL PROHIBITED BY STATUTE FROM SEARCHING THE MOTOR VESSEL?

III. IF THE FLORIDA MARINE PATROL WAS PROHIBITED BY STATUTE FROM SEARCHING THE MOTOR VESSEL, WAS THEIR SEARCH CONSENTED TO AND THEREFOR AUTHORIZED?

IV. EVEN THOUGH THE SEARCH OF THE HOLD WAS PROHIBITED BY STATUTE, WAS THE SEARCH BY THE FLORIDA MARINE PATROL NONETHELESS MADE VALID AS BEING:

A. Incident To The Arrest, Or

B. A Carroll Exception, Or

C. An Appropriate Inspection For Safety Reasons?

V. IF THE STATE'S CASE AGAINST THE DEFENDANTS DEPENDED UPON EVIDENCE OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH OR SEIZURE, SHOULD THAT INCRIMINATING EVIDENCE HAVE BEEN EXCLUDED BY THE TRIAL COURT?

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INTRODUCTION

The Petitioner is the State of Florida. The Respondents are CONSTANTINO CASAL and OMAR GARCIA. The parties will be referred to in this Brief as they stood in the Trial Court. All references to the Record on Appeal will be by the symbol "R". The symbol "T" will designate the Transcript of the Trial. All reference to the Transcript of a Motion to Suppress Evidence and Confession will be designated by the symbol "M".

OPINIONS BELOW

The Defendants were both found guilty by the Circuit Court of Monroe County, Florida of the offenses of being in possession of more than 100 pounds of marijuana and the importation of marijuana. The Defendants' convictions were reversed by Florida's Third District Court of Appeal in *Casal* v. *State* 375 So. 2nd 1077 (3rd DCA 1979). The Appellate Court's reversal was stated to be based upon the ruling of *Delaware* v. *Prouse*, 440 U.S. 648 (1979). The State petitioned and obtained a rehearing. Upon reconsideration by the Third District Court of Appeal the Court concluded that its opinion and judgment should be adhered to. The State obtained certiorari review by the Supreme Court of Florida which approved the decision by the Third District Court of Appeal to reverse the conviction of the Defendants, but in doing so concluded that the stopping of the vessel was permissible but the search that followed was unreasonable and not based on probable cause. *State* v. *Casal*, 410 So. 2nd 152 (Fla. 1982). The State filed a motion for rehearing which was denied by the Supreme Court of Florida. The opinion of the District Court on remand is reported as *Casal* v. *State*, 411 So. 2nd 1040 (Fla. 3rd DCA 1982).

JURISDICTION

From the decision of the Supreme Court of Florida, the State filed a Petition for Certiorari which was granted on October 4, 1982. Jurisdiction was invoked by the State pursuant to 28 U.S.C. § 1257 (3).

STATUTORY PROVISIONS INVOLVED

Florida Statute 370.021 (5) administration, rules, regulations of the Department of Natural Resources and the powers of officers. . . .

> "The executive director or any of the conservation officers shall have the authority, without warrant, to board, inspect, and search any boat, fishing appliances, storage or processing plant, fishhouse, spongehouse, oysterhouse, or any warehouse, building, or vehicle engaged in transporting any fish or fishery products. Such authority to search and inspect without a search warrant is limited to those cases in which the executive director or officers have reason to believe that fish or any saltwater products are taken or kept for sale, barter, transportation, or other purposes in violation of laws or rule promulgated under this law."

Florida Statute 371.58 Safety Inspections; Qualified

> "No officer shall board any vessel to make a safety inspection if the owner or operator is not aboard. When the owner or operator is aboard, an officer may board a vessel with consent or when he has probable cause or knowledge to believe that a violation of a provision of this chapter has occurred or is occurring."

Renumbered as Florida Statute 327.56.

Article I Section 12 of the Florida Constitution; Searches and seizures:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable

searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. *Articles or information obtained in violation of this right shall not be admissible in evidence.*"

Fourth Amendment of the United States Constitution.

"The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

STATEMENT OF THE CASE

On September 17, 1977 Officers Walker and Soli of the Florida Marine Patrol were on duty patroling the Atlantic Ocean off Sugarloaf Key in Monroe County. (M.30; T.42-43). They had heard that lobsters were being stolen from traps in that area, and they were looking for the thief. (M.4, 29). At approximately midnite to 1:00 a.m. of September 18, 1977 they came upon a motor vessel named the San Raffael. The boat was not being fished at the time and the officers had no reason to believe that fish were being caught on the boat or that fish were being sold in the State of Florida. (M.17). The San Raffael was underway at the time and was being lawfully operated. The persons on board were doing nothing consistent with what persons do who are robbing traps. It did not appear that they were even pulling traps. The police officers admittedly had no reason to believe that the San Raffael or the persons on board were involved in trap robbing. (M.16, 36, 37, 43). The weather condition was poor. The seas were rough. (M.5, 9; T.32). The police officers decided to stop the boat anyway. They slipped up behind the San

Raffael intending to surprise its occupants. The senior police officer instructed the junior officer not to turn the flood light on until they were approximately 50 feet from the San Raffael. (M.3, 29, 43: T.11). There were two men on board, OMAR GARCIA and CONSTANTINO CASAL, the Defendants in this case. The location of the boat at this time was 1 1/2 to 2 miles further out to sea than the Nine Foot Schol Light. (M.34). The police officers were uniformed. (T.12). Pursuant to the officers command, the San Raffael was brought to a stop. (M.4). The police officers brought their patrol boat along side the San Raffael and the boats pounded together in the heavy seas. (M.4, 5, 9; T.11). Although the purpose of the police officers in stopping the San Raffael was to check them to see if they were lobster thieves, they announced to the occupants of the San Raffael that they wanted to check their boat registration papers. (M.4, 5, 29, 30). Documentation papers and a receipt that taxes had been paid on the boat were produced. (M.5, 10). The officers were told by GARCIA, the person in command of the San Raffael, that there were no registration papers on board. (M.10, 30). While this conversation with reference to the registration papers was going on, the boats were being thrown together by the heavy seas. (M.5, 9; T.32). Officer Soli then asked permission to board the San Raffael and one of its occupants helped her when she climbed aboard. (M.5, 30). Although Officer Soli did not see or have reason to believe that this vessel either fished in Florida waters or sold fish in Florida, and although she was told that the vessel was used for fishing in the Bahamas where it was in route to at the time it was stopped, Officer Soli intended to search the vessel and immediately embarked upon that search upon boarding the vessel. (M.38, 39). She didn't board the vessel to check for papers or safety equipment as is contended by the State of Florida in its Brief to this

Court. (M.38, 39). She started the search by going into the wheel house. (M.6). She then opened and searched the grocery box. (M.6). This was followed by a search of the cabin. (M.6). Nowhere in the records is there an indication that a consent was requested or that a consent was given for the search of the wheel house, grocery box and the cabin. Officer Soli then asked for permission to search the icebox which permission was granted. (M.32). She had one thing in mind and that was to search the main fishbox. (M.42). She said to GARCIA "I'd like to check your forward hold." GARCIA asked Officer Soli if she had a search warrant. Officer Soli responded by saying "No, I don't have any search warrant, but I would like to see what you have, you know, what seafood products you have. I'd like to check your forward catch box." GARCIA kept asking Officer Soli if she had a search warrant and Officer Soli kept answering his question the same way. GARCIA refused to permit the continued search without a search warrant. (T.17, 18). Officer Walker upon hearing this told GARCIA that they did not have a search warrant, they did not need a search warrant, they were not searching the boat, and that he was placing them under arrest for failure to carry the registration papers. (T.34). After being arrested GARCIA said "there is no use of you going any further. There's grass aboard." (M.32, 44, 45). Officer Walker read the Miranda rights in english. GARCIA understood english and CASAL did not. (M.7, 8, 9). Officer Walker then asked GARCIA what was on board and GARCIA told him. (M.8). The Defendants were asked to lift the hatch so that Officer Soli could look inside the fish hold. They did and for the first time Officer Soli saw and smelled the marijuana. (M.45). The fishing vessel was taken to Key west. CASAL was read his rights in Spanish and he then admitted to knowing that marijuana was on board. (T.59).

On September 26, 1977 the Defendants were charged by information with one count of possession of more than 100 pounds of marijuana, and one count of importation of marijuana. (R.1-3) Both of the Defendants entered pleas of not guilty to both of the counts and demanded trials by jury. (R.4). Prior to trial the Defendants filed a Motion to Suppress as Evidence the marijuana which was seized by the State of Florida. The Defendants also filed a Motion to Suppress as Evidence certain oral statements made by the Defendants. (R.18-19, 21-22). Prior to trial the Court had an evidential hearing on those Motions and denied them. (R.20; M.1-60).

A jury trial on the case was commenced on September 20, 1978. (T.1). The trial was concluded the following day on September 21, 1978 at which time both of the Defendants were found guilty as charged. (R.23-25). On November 21, 1978 OMAR GARCIA was sentenced to five (5) years in the State Correctional System with the recommendation that he be assigned to the youthful offender program. (R.30-31). On that same date, CONSTANTINO CASAL was sentenced to three (3) years in the State Correction System. (R.28-29).

Both of the Defendants filed Notices of Appeal. (R.32). Briefs were filed by all of the parties and an Oral Argument was had before the Third District Court of Appeal. On August 14, 1979 the Appellate Court did render its written opinion holding that the stopping of the Defendants' vessel was improper in view of the fact that the police officers admittedly had no suspicion, founded or otherwise, that those aboard were engaged in any unlawful activity but simply made the stop to check the vessel's registration papers. The Court ruled that the Motion to Suppress as Evidence the contraband which was seized as a result of the improper stop should have been granted.

The Judgment was therefore reversed and the cause remanded with directions to discharge both of the Defendants. *Casal* v. *State*, 375 So.2nd 1077 (Fla. 3rd. DCA 1979). The Appellate Court in applying the United States Supreme Court case of *Delaware* v. *Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed. 2nd 660 (1979) reasoned that there is no basis for distinguishing between automobiles and boats in applying the Fourth Amendments proscription of unreasonable searches and seizures. On August 28, 1979 the State filed a Motion for a Rehearing. Briefs were filed by both of the parties and thereafter an Oral Argument was had. On November 6, 1979 the Appellate Court entered its Final Order concluding that its Opinion and Judgment filed on August 14, 1979 should be adhered to. (R.42).

The State of Florida invoked the certiorari jurisdiction of the Supreme Court of Florida on November 28, 1980. The Supreme Court of Florida accepted certiorari jurisdiction and on January 14, 1982 did render its opinion approving the Third District Court's reversal of the conviction. Its reasoning, however, differed from the Third District Court. The Supreme Court of Florida found that the initial stopping of the vessel by the Florida Marine Patrol was reasonable, but it also found that the subsequent search was unreasonable because it was not based on probable cause. *State* v. *Casal*, 410 So.2nd 152 (Fla. 1982).

SUMMARY

No statutory authority existed permitting the Florida Marine Patrol to stop a vessel to inspect its papers. The Defendants' vessel was documented and the Marine Patrol Officers had no reason to believe that it had been fishing in Florida waters or that it sold seafood products

in Florida. Although this was true, the Marine Patrol Officers nevertheless wanted to search the vessel. This they did and when GARCIA attempted to stop what appeared to him to be an unlawful search by asking the Marine Patrol Officer if she had a search warrant, the Marine Patrol Officer announced that a search warrant was not needed and that the Defendants were under arrest. With this GARCIA admitted that the forward hold contained marijuana which was proven to be true by the follow-up search. The acts of the Florida Marine Patrol in boarding and searching the Defendants' vessel without a search warrant were prohibited by Florida Statute 370.021(5) unless the Marine Patrol Officer had reason to believe that fish or saltwater products were taken or kept for sale in violation of the laws of the State of Florida. It should be noted with reference to the Marine Patrol Officers assertion that the Defendants were under arrest for failing to have registration papers, that no citation or other legal proceeding was initiated by the State in this regard. The sole charges against the Defendants were those pertaining to the marijuana.

The Judgment of the Florida Supreme Court in *State* v. *Casal*, 410 So. 2nd 152 (Fla. 1982) was correct in that it approved the Third District Court's reversal of the Defendants' conviction. It did this even though it refused to apply this Court's decision in *Delaware* v. *Prouse*, 440 U.S. 648 (1979) and the 9th Circuit Court of Appeals cases in *United States* v. *Piner*, 608 F. 2nd 358 1979) and more recently in *United States* v. *Watson*, 678 F. 2nd 765 (1982). It nevertheless arrived at the proper Judgment by concluding that the subsequent search was not consented to and was not based on probable cause. The evidence obtained as a result of this unlawful search was not admissible in evidence by virtue of Article I, § 12 of the Florida Constitution.

ARGUMENT

I

THE FLORIDA MARINE PATROL IS CONSTITUTIONALLY PROHIBITED FROM MAKING A RANDOM STOP OF A MOTOR VESSEL THAT IS NOT OBSERVED VIOLATING ANY LAW NOR IS IT ENGAGED IN ANY SUSPICIOUS ACTIVITY WHEN THE PURPOSE OF STOPPING THE MOTOR VESSEL IS TO CHECK THE VESSEL'S PAPERS.

This question addresses the Court to one of the fundamental rights of all citizens. Article I Section 12 of the Florida Constitution prohibits unreasonable searches and seizures as does the Fourth Amendment to the United States Constitution. In applying these constitutional protections to the case at hand, the Court's attention is directed to the factual setting at the time and place of the stopping of the San Raffael. The place was several miles off shore from Sugarloaf Key, a remote area of the Florida Keys. It was midnight and the weather conditions were poor with the seas rough when the Florida Marine Patrol first observed the San Raffael. By all outward appearances it was merely another vessel underway. The Marine Patrol Officers had no probable cause to believe that the occupants of the San Raffael were engaged in any form of criminal activity. The officers admitted that they had no suspicion of any kind that the occupants of the San Raffael had or were violating the law in any way. Nevertheless the Florida Marine Patrol Officers elected to make a random check of the San Raffael. With the cover of darkness and rough seas they approached the San Raffael from its stern intending to escape detection. When they were within 50 feet of the San Raffael they suddenly turned their flood light on and directed the beam into the cockpit of the Defendants' boat. The Marine Patrol boat then drew alongside the San Raffael and Officer Walker commanded the helmsman of the San

Raffael to take the boat out of gear. Both boats were then side by side being thrown into one another by the rough seas. These multi ton vessels under such conditions are apt to cause not only extensive damage to one another, but the risk of injury and loss of life is also eminent. The purpose for this hazardous undertaking was the hope that the officers might by chance find the thief who was stealing lobsters from other fishermen's traps. The pretext given by the officers for stopping and detaining the Defendants was to check their registration papers.

What was the source of the police officers assumed authority to stop the San Raffael? They had no reason to believe or even a suspicion of any wrong doing. Their pretext justification for stopping the San Raffael was to see their registration papers. This was a documented vessel. (M.5). The San Raffael was therefore excluded from the requirement of registration under Section 371.051(1) because by definition a "motorboat" means any undocumented vessel propelled by machinery. (See Section 371.021(2), Fla. Stat.) It cannot be contended by the State of Florida that the San Raffael was required to be numbered pursuant to the requirements of Section 370.06(1). The evidence was that the officers never saw the San Raffael fish in Florida waters nor had they ever seen or heard of its catch being sold in the State of Florida. Instead they were informed that the boat fished in the Bahamas. (M.17, 18). Even if we are to assume that the San Raffael was required to be numbered, which it was not, does Section 371.051(4), Fla. Stat. requiring that the Certificate of Registration be available on board for inspection authorize the officers to stop the San Raffael. In *Delaware* v. *Prouse* 440 U.S. 648, 99 S. Ct. 1391, 59 L.Ed. 2nd 660, (1979) the Supreme Court concerned itself with the stopping of an automobile and the detention of

the driver in order to check the driver's license and the registration of the automobile. The State of Delaware had a statute in force at the time that Prouse was arrested which was similar to Florida's Statute regarding the boat registration papers to be on board and available for inspection. 21 ¶ 2721(b), Delaware Stat. provided as follows:

> "The licensee shall have such license in his immediate possession at all times when driving a motor vehicle and shall display the same upon demand of a uniformed police officer, justice of the peace, peace officer or motor vehicle inspector."

Florida Statute 371.051(4) regarding boat registration papers reads as follows:

> ". . . The Certificate of Registration shall be pocket-size and shall be available at all times for inspection on the motor boat for which used, whenever such motor boat is in operation."

Neither the Delaware Statute nor the Florida Statute gave statutory authority to a police officer to stop any or every vehicle or boat to determine if the license or registration papers were required and if they were if the operator had those papers.

The Supreme Court of the United States in commenting upon the licensing requirement stated as follows:

> "When there is no probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations—nor other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discre-

> tion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some entent."

The physical and psychological intrusion found to exist in the Prouse case could not begin to compare with the intrusion that occurred in this case. In the Prouse case the Defendant's automobile was stopped at approximately 7:20 p.m. on the highway in New Castle County, Delaware. In the case at bar the Defendants were stopped in the middle of the night several miles off a remote area of the Florida Keys when the weather conditions were adverse and the sea rough. The State of Florida in its Brief, both in the Statement of Fact as well as its arguments, assumes that the police officers stopped the San Raffael for the purposes of checking the registration papers and safety equipment aboard. The reason it assumes that the officers stopped the San Raffael to also conduct the safety check is because of a need to justify the stop. At the time of the hearing on the Defendants' Motion to Suppress the Evidence, Officer Walker testified that he stopped the San Raffael to check the registration papers. (M.4,5). Officer Stretcher, a/k/a Ginny Soli, on direct examination testified that they stopped the San Raffael and informed the Defendants that they wished to check their registration papers. (M.30). She then went on to testify under direct examination that when she boarded the vessel she was also conducting a safety check of the boat. (M.31). However on cross examination she admitted that she did not go aboard for the purposes of conducting a check of safety equipment. She further admitted that she in fact did not conduct a safety check. She was looking for seafood. (M.38, 39). Such a random stop of a motor vessel to check its papers cannot be justified by the marginal contribution that may be made by such a spot

check to determine if the registration papers or documentation are aboard. Every occupant of every boat in Florida waters would be subject to a seizure at the unbridled discretion of law enforcement officials if such were the rule.

Except where there is articulable and reasonable suspicion that the vessel is not registered, or that the vessel is subject to seizure or the occupants subject to arrest for violation of law, stopping a vessel and detaining it in order to check its registration papers is unreasonable and a violation of the Bill of Rights of both the Federal and State of Florida Constitutions. Stopping a vessel and detaining its occupants constitutes a seizure within the meaning of said constitutions even though the purpose of the stop is limited and the resulting detention brief. The permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individuals constitutional rights against the interest intended to be promoted by the practice. The States interest in stopping a vessel and detaining its occupants as a means of checking to see if the registration papers or documentation papers are on board does not outweigh the intrusion on the privacy and security of the occupants of such vessels when they are stopped at random at the unbridled discretion of the Marine Patrol Officers. *United States* v. *Brignoni-Ponce*, 422 U.S. 873; *United States* v. *Martinez-Fuerte*, 428 U.S. 543. The minimal contribution to the interests of the State of Florida of requiring registration papers to be kept on board vessels which are required to be numbered cannot justify the seizure of every vessel in Florida waters, whether required to be numbered or not, and the arrest of the persons on board at the whimsical discretion of law enforcement officials. Individuals operating or traveling in vessels in Florida

waters do not lose all reasonable expectation of privacy simply because the vessel and its occupants are subject to government regulations. Those people are not stripped of all constitutional protection when they step from their homes on to the public sidewalk or dock; nor are they shorn of those protections when they step from the dock into their boat. The Fourth and Fourteenth Amendments to the Federal Constitution and § 12 of Article I of the Florida Constitution are focal points in this case because stopping a vessel and detaining its occupants constitutes a seizure within the meaning of those Amendments even though the purpose of the stop is limited and the resulting detention quite brief. *United States* v. *Brignoni-Ponce*, supra; *United States* v. *Martinez-Fuerte, supra; Delaware* v. *Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 596, Ed.2d. 660 (1979). The essential purpose of the proscriptions in the Federal and State Constitutions is to impose a standard of *"reasonableness"* upon the exercise of discretion by government officials, including law enforcement agents such as the Florida Marine Patrol Officers, in order to safeguard the privacy and security of the individuals against arbitrary governmental invasion. *Delaware* v. *Prouse, supra; Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967). The reasonableness standard usually requires at a minimum that the facts upon which the intrusion is based be capable of measurement against an objective standard. *Terry* v. *Ohio*, 392 U.S. 116 (1968); *United States* v. *Santana*, 437 U.S. 38 (1976). Safeguards are generally relied upon to assure that the individuals reasonable expectation of privacy is not subject to the discretion of the officials in the field. *Camara* v. *Municipal Court, supra; Marshall* v. *Barlow's, Inc., supra; United States* v. *United States District Court*, 407 U.S. 297. This objective standard must even be applied to warrantless intrusions

on individuals constitutional rights when there is probable cause that a crime is being committed. *United States* v. *Santana, supra; United States* v. *Watson*, 423 U.S. 411 (1976); *Kerr* v. *California*, 374 U.S. 23 (1963); *United States* v. *Artiz*, 422 U.S. 89 (1975); *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). In the case at bar there was no probable cause that a crime had been or was being committed. There wasn't even a suspicion that the Defendants were engaged in any form of criminal activity. The officers were on a proverbial fishing expedition hoping to find a lobster thief and those officers used as a pretext to justify stopping the San Raffael at night miles out at sea in a remote area of the ocean which was at the time rough, that they wished to examine the registration papers. It was a classic euphemistic "routine" check. The stopping and detention was wholly capricious. Assuming the San Raffael was required by Florida law to be registered, and there is no indication in the record to indicate that it was, it would be a misdemeanor of the second degree for the registration papers not to be on board. A regulatory inspection for such papers unaccompanied by any articulable suspicion of wrong doing, must be undertaken pursuant to previously specified "neutral criteria." *Marshall* v. *Barlow's Inc., supra.* The record in this case does not reveal that the officers of the Florida Marine Patrol were ever given a standard on which to base their decision to stop and board a vessel. Nevertheless, without statutory authority and without any standard to guide them, the Marine Patrol Officers stopped the San Raffael. The governmental intrusion causes the private interest to suffer even though the governments motivation in honorable. In this case they were hoping to find a lobster thief and if they saw a vessel that was not violating the law in any way and which was not involved in any suspicious activity, they intended to stop the vessel anyway and use as a

pretext for the stop that they were investigating to determine if the vessel needed registration papers and if so if the registration papers were aboard. This pretext investigation was being conducted even though they had no reason to believe that the boat was required to be numbered, and if it was required to be numbered, that the papers were not aboard.

The stopping of the San Raffael constituted a de facto and de jure arrest of its occupants and a seizure of the vessel.

The Supreme Court of the United States in the case of *Delaware* v. *Prouse* considered this point of law. It is a current and in depth analysis of the application of the Fourth Amendment of the United States Constitution to random stops of citizens by police officers. The principals set forth in this decision as well as the follow-up decision by the Supreme Court of United States in *Brown* v. *Texas*, 443 U.S. 47 (1979) have application to the case at bar. Since the decision by the Supreme Court of the United States in Prouse, the Ninth Circuit Court of Appeal has been confronted with two separate cases involving document and safety inspections of vessels by the Coast Guard. It should be noted in analyzing the case at bar with these two cases that the Coast Guard has statutory authority permitting them to board vessels for document and safety inspections. In the case at bar there was no statutory authority. The first case before the Ninth Circuit was *United States* v. *Piner*, 608 F.2nd 358 (1979). The Court on page 361 of its opinion stated as follows:

> "And we believe that under Prouse it is the weight of this subjective intrusion that must be balanced against the governmental need. If the stop of an automobile upon a public highway by an identifiable

police car is felt to create such subjective intrusion as to require the use of potentially less intrusive alternatives, surely the stop of an isolated boat after dark, followed by a physical intrusion upon the boat itself, would have an unsettling effect immeasurably greater, placing a far greater demand upon the government to come forward with balancing factors.

If the purpose of the random stop is to ascertain and discourage noncompliance with safety regulations, we see no reason why this purpose cannot sufficiently be accomplished during the daylight hours. Thus reliance on this less intrusive means eliminates the need for stops and boardings after dark where no cause to suspect noncompliance exists."

Thereafter the Ninth Circuit in *United States* v. *Watson*, 678 F.2nd 765 (1982) held that the facts of that case warranted a conclusion that the documentation inspection stop of the vessel on the high seas in that case did not violate the Fourth Amendment. The Court in distinguishing the Watson case from the Piner case stated on page 767 of the opinion the following:

"Piner involved a random stop of a 43 ft. sailboat during a routine Coast Guard patrol of San Francisco Bay. As here the commander acted without a warrant and without probable cause to believe or a founded suspicion that a violation of the law had occurred. Also as in this case, the stop occurred after dark, at approximately 6:30 p.m. But unlike this case, the decision to board in Piner was made solely by the commander aboard the Coast Guard cutter, was not pursuant to an administrative plan, and was for the sole purpose of inspecting for compliance with safety regulations."

The Court made further comparisons on page 768 of its opinion. It stated as follows:

"Comparing the facts here with those of Piner, particularly in light of the analysis set forth in Prouse,

> we find that Piner does not help us determine whether the stop of the Globe Trotter was reasonable under the Fourth Amendment. The overall intrusion was less here than in Piner, and the government interests were greater. On the intrusion side of the balance, the objective intrusion here was essentially the same as that in Piner, but the subjective intrusion was less. The Coast Guard took several specific steps to minimize concern or fright on the part of the Globe Trotter crew. The stripe-lights were energized early, so that defendants would have less reason to be fearful. Radio contact was made almost a half-hour before boarding. The defendants could not have had any sense of being singled out arbitrarily, as would the occupants of a car plucked from a stream of traffic. Unlike the stops in Piner and Prouse, this stop was not made on a random basis at the discretion of an officer in the field; rather, Commander Chapman was acting according to an administrative plan directing him to stop all vessels less than 200 ft. in length."

In the case at bar there was no administrative plan directing the Marine Patrol Officers to stop the vessels in the area. This was purely a random stop with the police officers having no reason to believe that the occupants of the vessel were involved in any form of illegal activity. In addition thereto the stop occurred in the middle of the night on the high seas without prior announcement or warning by the Marine Patrol Officers under circumstances that could not be more intrusive. The officers surreptitiously approached the Defendants' vessel and when close upon it turned on a flood light illuminating the Defendants' vessel. The object of the Marine Patrol Officers was to surprise the Defendants and catch them off-foot. In contrast, the Coast Guard in the Watson case exercised care and concern for the citizenry in their expectation of privacy by attempting not to frighten the

crew of the vessel they intended to board. The State's interests in determining whether or not a vessel in Florida waters is required to be registered and if so whether or not that vessel has its registration papers on board must be weighed in the balance against this type of intrusion. Not only is a confrontation by force rendered likely by this mode of boarding, the citizens are also being unreasonably subjected to having their motorboats and sailboats damaged and their persons subjected to the risks of injury. It is neither the time nor the place for the Marine Patrol to check boat papers. The job could just as easily be done under less intrusive circumstances and when the risk of harm to property or injury to the persons on board is less.

II.

THE FLORIDA MARINE PATROL WAS PROHIBITED BY STATUTE FROM SEARCHING THE MOTOR VESSEL.

The Defendants were on board a documented vessel. Being documented it was not required by Florida Statutes to be registered with the State of Florida. Florida Statute 371.131 renumbered to 327.15 provided as follows:

> "A boat shall not be required to be numbered under this chapter if it is in one of the following classifications:
>
> (1) Undocumented vessels used exclusively for racing.
>
> (2) Vessels operating under valid temporary certificate of number.
>
> (3) A vessel already covered by a number in full force and effect which has been awarded to it pursuant to federal law or a federally approved numbering system of another state; provided that such boat shall not have been within this state for a period in excess of 90 consecutive days.

(4) A boat from a country other than the United States temporarily using the waters of this state.

(5) A boat whose owner is the United States.

(6) A ship's lifeboat.

(7) *A boat holding a valid marine document issued by the United States bureau of customs or any agency successor thereto.*

(8) A boat used exclusively on a privately owned lake."

That chapter of Florida law, which also deals with safety equipment, prohibits an officer from boarding a vessel to make a safety inspection without the owner's consent if he is without probable cause or knowledge to believe that a violation of a provision of that chapter has occurred or is occurring. Fla. Statute 371.58 renumbered as 327.56 reads as follows:

"No officer shall board any vessel to make a safety inspection if the owner or operator is not aboard. When the owner or operator is aboard, an officer may board a vessel with consent or when he has probable cause or knowledge to believe that a violation of a provision of this chapter has occurred or is occurring."

With reference to the conservation laws of the State of Florida, the conservation officers are prohibited from searching a vessel without a search warrant unless they have reason to believe:

a. That the vessel is engaged in transporting fish or fishery products, and

b. They also have reason to believe that the conservation law is being violated.

The appropriate portion of Florida Statute 370.021(5) Powers of Officers reads as follows:

". . . The executive director or any of the conservation officers shall have the authority, without warrant, to board, inspect, and search any boat, fishing appliances, storage or processing plant, fish house, sponge house, oyster house, or any other warehouse, building, or vehicle engaged in transporting any fish or fishery products. *Such authority to search and inspect without a search warrant is limited to those cases in which the executive director or officers have reason to believe that fish or any salt water products are taken or kept for sale, barter, transportation, or other purposes in violation of laws or rules promulgated under this law.*"

The Defendants' vessel was traveling in a direction towards the open sea at the time it was stopped by the Florida Marine Patrol. The Marine Patrol Officers admitted that they had no knowledge that this vessel had ever fished in Florida waters or that it had ever sold any fish products in the State of Florida. The informaton that the Florida Marine Patrol did have was that the vessel was on its way to the Bahamas. The activities of the United States Coast Guard in stopping vessels, checking their papers and conducting safety equipment checks thereon is authorized and sanctioned by Federal Statutes. In contrast such activities by the Florida Marine Patrol are prohibited by Florida Statute.

III.

IF THE FLORIDA MARINE PATROL WAS PROHIBITED BY STATUTE FROM SEARCHING THE MOTOR VESSEL, WAS THEIR SEARCH CONSENTED TO AND THEREFOR AUTHORIZED?

The testimony of both the Marine Patrol Officers at both the hearing on the Motion to Suppress as well as the Trial indicates that the officers commanded that the San Raffael be brought to a stop, the officers detained the occupants of the San Raffael for questioning while the

boats were being pounded together by the rough seas, and then Officer Soli asked permission to go aboard and while going aboard was assisted by one of the persons on the San Raffael. (M.5, 9). At this stage it must be shown by clear and convincing evidence that the Defendants freely and voluntarily consented to the boarding of the vessel which was tantamount to the beginning of a warrantless search. In order for a person to be considered to have waived his search and seizure rights, it must clearly appear that he voluntarily permitted or expressly invited and agreed to the search. *Taylor* v. *State*, 355 So.2nd 180 (Fla.3d DCA 1978). In the case at bar the Defendants had already been arrested and their boat seized when Officer Soli elected to assert her presumed authority by going aboard the vessel. The fact that the Defendants were already unlawfully stopped must be taken into account and considered in assessing the totality of the circumstances on the issue of voluntariness. (See Taylor vs State, Supra.). Officer Soli upon boarding the vessel immediately embarked upon a search of the vessel. She was not content with questioning the occupants. She was on board to search the vessel and that was what she did. Although the State would prefer the facts to be that she was involved in a safety check, she admittedly was not. (M.38). She didn't get permission to go into the cabin of the San Raffael and search it, and yet she did. She didn't get permission to search the grocery box. This did not deter her. She searched it anyway. When it came to the fish hold, she asked permission to search it. At this point GARCIA asked if she had a search warrant. She replied she didn't but said she would like to check it anyway. The inquiry about the search warrant continued with GARCIA being adamant that he was not going to permit the search if the officers did not have a search warrant. Officer Walker who was at that time in the Marine Patrol

boat overheard this conversation and retorted that they did not have a search warrant, that they did not need a search warrant, that they were not searching and that GARCIA was under arrest. It was then that GARCIA "consented" to the search of his fish hold where the marijuana was stored.

The central question presented for review in the case of Taylor v. State was whether a free and voluntary consent to a warrantless search of a boat can be obtained by law enforcement officers after such officer has begun an admittedly unlawful search of the boat. The Court in that case found that the consent was coerced. The coercion was found to exist because the police officer had already asserted, by his actions in initiating an unlawful search, that he had the authority to conduct a complete search of the vessel. In the case at bar we have some further elements to show coercion. The Defendants were unlawfully stopped while in the Taylor case the Defendant was lawfully stopped. According to the Prouse case this unlawful stopping amounts to a de jure arrest of the Defendant. In the Taylor case the Defendant did not ask the police officer if he had a search warrant or if a search warrant was necessary. In the case at bar the police officer was asked by the Defendant if he had a search warrant and the police officers misinformed him. (*See Bumper* v. *North Carolina*, 391 US 543 (1968). The police officer said he had a search warrant when he did not).

The Court in Taylor v. State at 183 states as follows:

> "A distinction is recognized in the law between submission to the apparent authority of a law enforcement officer and unqualified consent. Mere acquiescence in a search is not necessarily a waiver of a valid search warrant. Rather for a person to waive his search and seizure rights, it must clearly appear that

> he voluntarily permitted or expressly invited and agreed to the search."

Bailey v. *State*, 319 So. 2nd 222, 27 (Fla. 1975); *Talavera* v. *State*, 186 So. 2nd 811 (Fla.2nd DCA 1966). The fact that the prior illegal search yielded no contraband in no way disipates the illegality of such search nor its obvious course of the effect on the Defendant. Viewing the evidence in this cause in a light most favorable to the State, it must be concluded that Officer Soli conducted an illegal search of the cabin and the bread box on the Defendants' boat which in conjunction with the police officers assertion that a search warrant was not needed and the indication that the search was going to be conducted whether the Defendants liked it or not presumptively tainted and made involuntary the Defendants alleged silent consent to search the boat hold.

Deception can take many forms. Misrepresentation, deceit, fraud, ruse, trickery and guile are but a few. The legal and vernacular nuances in meaning between these terms disappear when they are used in the context of consent searches. *Radowick* v. *State*, 145 Ga. App. 231, 244 S.E. 2d 346 (Ct.App. 1978); *State* v. *Blackburn*, 6 N.C. App. 510, 170 S.E. 2d 50, (Ct. App. 1968) In the case at bar the Marine Patrol Officers through their assertive conduct communicated false and misleading information as to their authority to stop the San Raffael, detain its occupants, board the vessel and thereupon to search that vessel. This assertion of authority not only intimidated and browbeat the Defendants into acquiescing to the search, it also tricked them into believing that the police officers were authorized to do what they were doing. The crescendo of the misrepresentation occurred when GARCIA refused to permit Officer Soli to continue with her unlawful warrantless search. At that point Officer Walker announced that he didn't have a search warrant and

that he didn't need a search warrant to search the vessel. This final misrepresentation, being an intentional and direct verbal misrepresentation, is a more easily recognizable type of deception and is well developed from a decisional standpoint. *Commonwealth* v. *Wright*, 411 Pa. 81, 190 A. 2d 709 (1963); *United States* v. *Reckis*, 119 F. Supp. 687 (D. Mass. 1954) This false and forceful assertion of authority when combined with the preceding invasion of privacy and trample of rights, coerced and compelled the Defendants to permit the further search of their vessel. Such deception and resulting coercion can indeed have no other affect upon the forced consent to the search than to vitiate it. *Bumper* v. *State of North Carolina*, 391 U.S. 542 (1968); *Villari* v. *State*, 372 So.2d 522 (Fla. 1st DCA 1979).

The forceful assertion of nonexistent authority to search the motor vessel without a search warrant bore fruit for the State. The Defendants acquiesced to the demands of the Marine Patrol Officers to search the forward hold and they admitted that marijuana was located therein. The Marine Patrol Officers upon discovering this and hearing this admission attempted to improve the position of the State by reading to the Defendants their *Miranda* rights. The admissions by both GARCIA and CASAL were all part of one continuous process commencing with the unlawful stopping of the vessel, continuing during the unlawful search and the misrepresentation by the Marine Patrol Officer that a search warrant was not necessary for them to enter the forward hold. The fact that the *Miranda* rights were read to the Defendants did not negate the wrongdoing that had already been committed by the arresting officers, nor did it remove the taint from the admissions of the Defendants. The Court in *Taylor* v. *State, Supra,* stated as follows:

> "The only exception recognized by the cases in which a prior illegal arrest or search would not render a subsequent consent, confession or admission involuntary is where there has been a clear and unequivocal break in the chain of illegalities sufficient to dissipate the taint of the prior illegal action. These would certainly be rare cases as our Supreme Court has noted. Bailey v. State, 319 So. 2nd 22 (Fla. 1975)."

In that the search of the vessel was unlawful and the continued attempted search was likewise unlawful, the State in its Brief on page 26 argues that the Marine Patrol was not searching the vessel. Saying they weren't does not distract from the fact that they were searching the vessel and the contraband seized and statement against interest obtained was as a direct result of the illegal search.

IV.

EVEN THOUGH THE SEARCH OF THE HOLD WAS PROHIBITED BY STATUTE, WAS THE SEARCH BY THE FLORIDA MARINE PATROL NONETHELESS MADE VALID AS BEING:

A. INCIDENT TO THE ARREST, OR
B. A CARROLL EXCEPTION, OR
C. AN APPROPRIATE INSPECTION FOR SAFETY REASONS?

This inquiry is being made because it is contended by the State in its Brief that the search by the Florida Marine Patrol was valid because of one or more of the above stated exceptions. In order to determine whether or not any of the exceptions are appropriate to be applied in the case at bar, the facts of the case at bar must first be ascertained. Those essential facts for purposes of this inquiry are as follows:

A. A documented vessel while traveling in Florida waters at night not involved in any apparent criminal or suspicious activity was stopped by the Florida Marine Patrol. The purpose of the stop was to check its papers.

B. Documentation papers were produced.

C. Although the Marine Patrol Officers were prohibited by Florida Statute from searching the boat, they nonetheless embarked upon a search.

D. When the Marine Patrol Officer attempted to search the forward hold she was stopped by GARCIA and questioned repeatedly as to whether or not she had a search warrant. She said, "I'd like to check your forward hold." GARCIA asked her if she had a search warrant and she responded "no I don't have any search warrant, but I would like to see what you have, you know, what seafood products you have. I'd like to check your forward catch box." He kept asking Officer Soli if she had a search warrant and Officer Soli kept answering his question in the same way. GARCIA refused to permit the continued search without a search warrant and thereupon hearing this the other Marine Patrol Officer announced that they did not have a search warrant, that they did not need a search warrant, that they were not searching the boat and that GARCIA was under arrest for failure to have registration papers aboard. (T. 33)

E. GARCIA then consented to the search and admitted that the forward hold contained marijuana.

F. The *Miranda* rights were read to GARCIA and thereafter to CASAL.

With reference to the State's contention that the search was incident to the arrest, it is suggested that the reverse was true unless it could be said that the Defendants were arrested under the Prouse doctrine when the Marine

Patrol Officers stopped the Defendants' vessel. The stopping of the Defendants' vessel was unlawful. The searching of the Defendants' vessel was prohibited by statute and unlawful. The representation by the Marine Patrol Officer that a search warrant was not necessary in order to search the forward hold was a falsehood. The arrest of GARCIA for not having registration papers on board a documented vessel constituted a false arrest, and although said arrest was not followed up by the State with further criminal proceedings, the onslaught of strong-armed, prohibited and deceptive conduct by the Marine Patrol Officers produced incriminating evidence in the form of contraband and admissions. Because of this I do not feel it necessary to pursue the inquiry of whether or not this search would fall within the exception as being incident to a lawful arrest. For purposes of the inquiry it must be assumed that the stopping was lawful, the arrest was lawful and the search followed the arrest. None of these elements are present in this case.

An analysis of the cases cited by the State as well as other Federal and State decisions in point indicate that the vectors controlling the movement of the Court are:

A. That there be a lawful arrest, and

B. That the search be limited to an area into which the arrestee might reach in order to grab a weapon or evidentiary item.

The San Raffael was a 45 to a 49 ft. fishing vessel with a wheelhouse separating the aft cockpit from the forward hold where the marijuana was stored. Covering the forward hold was a heavy hatch which required two men to lift. On top of this hatch was located fishing traps which would first have to be removed in order for entry to be had into the hold. The arrest did not occur in the hold. It

occurred in the cockpit of the fishing vessel at the stern of the boat. If a search were to be considered as incidental to the arrest, the appropriate area for such a search would probably be in the cockpit of the vessel, but surely not in the forward hold. The Chimel case and the Belton case cited by the State are authority for the proposition that a warrantless search by the arresting officers in the case at bar was unlawful because it could not be considered as incident to the arrest. The State also cited *U.S.* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). This case concerned itself with the legality of a search by border patrol agents which search was conducted at a permanent checkpoint and pursuant to statutory authority. In the case at bar no statutory authority existed for the Marine Patrol Officers to search the vessel. In contrast there was a statutory prohibition against such a search. The Martinez-Fuerte case is therefor inappropriate to this consideration.

The State in advancing the argument of the Carroll Exception assumes that probably cause existed. In so doing it ignores the fact that both the Third District Court of Appeal and the Supreme Court of the State of Florida found that probable cause did not exist. The facts of the case, summarized in the opinion of the Supreme Court of the State of Florida and adopted by the State in its Petition for Writ of Certiorari, revealed that the Marine Patrol Officers embarked upon a search of the Respondents' fishing vessel the moment they got on board. They had no suspicion of any kind while they were conducting their search that the Respondents were involved in any form of criminal activity. The Respondents initially did not resist the search, but when the Marine Patrol Officer attempted to search the forward hold where the contraband was, the Respondents resisted the Marine Patrol Officers and told them that they would not permit the

search in absence of a search warrant. It was only after the Police Officers misrepresented their authority by telling the Respondents that they did not need a search warrant to search the forward hold, that the Respondents acquiesced to the Police Officers misrepresented authority to search and admitted to the presence of contraband in the forward hold. The *Carroll* v. *U.S.*, 267 U.S. 132 (1925), *Chambers* v. *Maroni*, 399 U.S. 42 (1970) and *U.S.* v. *Ross*, ____ U.S. ____, 31 Cr. L.3051 (1982) cited by the State in its Brief are inappropriate to the case at bar because there was probable cause in the cases cited to justify the warrantless search whereas in the case at bar there was not. In the case at bar the Marine Patrol Officers stopped the vessel without any probable cause or suspicion to believe that there was any criminal activity involved in by the persons on board and they thereafter conducted their search without any probable cause and contrary to a statutory prohibition. The fruits of their unlawful stopping, unlawful and prohibited search, misrepresented authority to search without a search warrant and the unlawful arrest eventually produced incriminating evidence which was rejected by the Third District Court of Appeal and the Supreme Court of the State of Florida. Article I § 12 of the Florida Constitution states that articles or information obtained as a result of an unreasonable search or seizure shall not be admissible in evidence. The State now asks the Supreme Court to accept in evidence the marijuana and the admissions, the products of the unlawful and prohibited search and unlawful arrests.

In order for the State to advance the administrative inspection theory, it assumes that the stop of the vessel and the search that followed was for the purpose of checking the fishing permits and the safety equipment. The statement of facts contained in the State's Brief does not

say this. The reason it does not is because the vessel was not stopped nor was it searched for those reasons. (M.37-39). Assuming for argument sake that the Marine Patrol Officer was conducting a safety inspection when she was searching the vessel, it must be recognized that the Florida Legislature has by statute prohibited a Florida Marine Patrol Officer from boarding or searching a vessel unless he has the consent of the owner or operator or probable cause or knowledge to believe that a violation of the safety law has occurred.[1] Florida Statute 371.58 renders inappropriate the cases cited by the State in its Brief. *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) concerns itself with a San Francisco housing code which attempted to authorize building inspectors to inspect residences without a warrant. The defendant brought an action for a Writ of Prohibition claiming that the ordinances authorizing such inspections was unconstitutional. The Supreme Court of the United States in its Opinion stated in part:

> "In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interest protected by the 4th Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the 4th Amendment guarantees to the individual, and that the reasons put forth in Frank v. Maryland and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the 4th Amendment's protections."

The Camara case stands for the proposition that if the Florida Marine Patrol wished to conduct an administrative search of the type that was done here, it would need a

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[1] Florida Statute 371.58 Safety inspections; qualified.

search warrant and this would only be issued if there was probable cause. It again must be pointed out in order to avoid the possibility of confusion that the Marine Patrol Officers were not conducting a safety inspection so this inquiry by the State has no application to the case at bar.

In the case of *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) a business man refused to permit an inspector from the Occupation Safety and Health Administration to conduct a warrantless search of his business premises which warrantless search was apparently authorized by a statute. The Supreme Court ruled that such an inspection could only be made with a search warrant. The Supreme Court stated in part as follows:

> "The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed. These are important functions for a warrant to perform, functions which underly the Court's prior decisions that the warrant clause applys to inspections for compliance with regulatory statutes. *Camara* v. *Municipal Court*, 387 U.S. 523. We conclude that the concerns expressed by the secretary do not suffice to justify warrantless inspections under O.S.H.A. or vitiate the general constitutional requirement that for a search to be reasonable a warrant must be obtained."

In summary the Camara and Barlow's cases both involved administrative inspections authorized by statute. In the case at bar the search was prohibited by statute.

The Supreme Court of the United States in both of the cases cited held that in order for the inspection to be lawful two things were required:

1. Probable cause must exist that a violation has occurred, and

2. A search warrant must first be obtained by the inspector in order for him to lawfully conduct his inspection.

In the case at bar there was neither probable cause nor a search warrant.

V.

IF THE STATE'S CASE AGAINST THE DEFENDANTS DEPENDED UPON EVIDENCE OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH OR SEIZUIRE, SHOULD THAT INCRIMINATING EVIDENCE HAVE BEEN EXCLUDED BY THE TRIAL COURT?

We are concerned in the case at bar not only with a violation of the Fourth Amendment of the United States Constitution but also a violation of Article I, Section 12, of the Florida Constitution. The framers of the Florida Constitution, desirous of protecting the rights of the citizens from unreasonable searches and seizures by the Government, stated in Article I, § 12 as follows:

> "The right of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. *Articles or information obtained in violation of this right shall not be admissible in evidence.*"

The Federal Constitution does not have the exclusionary rule built into the Fourth Amendment. If the Federal Court abandons the long established exclusionary rule set forth in *Mapp* v. *Ohio*, supra, we can expect policy decisions in the Federal Courts which undoubtedly will have the effect of undermining the Fourth Amendment rights. That risk does not exist in the Florida Courts due to the fact that the exlusionary rule is not a judicial rule but instead is a constitutional mandate. Justice Hubbart in writing the opinion in *Taylor* v. *State*, 355 So.2nd 180 (F.3rd DCA 1978) concisely compared the Fourth Amendment of the Federal Constitution to Article I § 12 of the Florida Constitution when he stated therein as follows:

> "The law is equally clear as to the evidentiary consequences attendant upon an unreasonable search and seizure under either the Federal or Florida Constitution. Any evidence seized by the law enforcement agents in violation of the Fourth and Fourteenth Amendments to the United States Constitution or in violation of Article I, § 12 of the Florida Constitution is inadmissible in evidence. It is sufficient if either one or both of these constitutional provisions have been violated in order to render the seized evidence inadmissible against the victim of the search in a Florida Court. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Gildrie v. State, 94 Fla. 134, 113 So. 704 (1927).
>
> (7) Although there has been some suggestion that the Fourth Amendment exclusionary rule should be altered or abolished, Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) (Burger, C.J. concurring, White, J. dissenting); Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (Burger, C.J. dissenting), the rule of Mapp v. Ohio, supra remains intact. In addition, even if the federal exclusionary rule is changed, this in no way affects the fifty year old rule

> in Florida that evidence seized in violation of Article I, § 12, of the Florida Constitution is inadmissible in evidence. Gildrie v. State, 94 Fla. 134, 113 So.704 (1927). "In Florida the exclusionary rule is not merely a judicial construct but is written into the Constitution itself. 'Articles or information' obtained unreasonably, within the meaning of Art. I, § 12, 'shall not be admissible in evidence.' " Croteau v. State, 334 So.2d 577, 580-581 (Fla. 1976) (Hatchett, J. concurring). As the Supreme Court of Florida in Sing v. Wainright, 148 So.2d 19, 20 (Fla. 1962), has cogently noted: "Mapp v. Ohio, supra, added nothing whatever to the law of Florida. It created no new procedural right so far as the jurisprudence of this State is concerned. This Court long ago concluded that evidence obtained as the product of an unreasonable search is not admissible in a criminal proceeding. Florida has long recognized the so-called 'exclusionary rule' regarding the inadmissibility of such evidence."

It is well established and recognized law in Florida that police officers are not justified in conducting a search merely because they desire to find incriminating evidence. *Carter* v. *State*, 238 So.2nd 681 (1970). The cases are manifold and uniform that probable cause must exist together with exigent circumstances in order to justify a warrantless search. The Court in *Miranda* v. *State*, 354 So.2nd 411 (1978) stated as follows in discussing the authority of the Florida Marine Patrol in searching vessels:

> "Such authority, however, does not carry with it the right to conduct a general exploratory search of the boat or automobile for evidence of crime. In the absence of probable cause or some other recognized exception to the search warrant rule, such warrantless searches are clearly unreasonable."

The Supreme Court of the State of Florida in the case of *Hill* v. *State*, 238 So.2d 608 (1970) established that rule

for the Florida Marine Patrol to follow. The Court in that case states as follows:

> "The permission to board must stop there, however. Any search or inspection of the boat without a search warrant must be accomplished within the frame work of probable cause described in Section 370.021(5) setforth in footnote 7 supra."

The Third District Court of Appeal in *Taylor* v. *State*, supra also pointed out the limitations of the Florida Marine Patrol Officers it stated on page 184 thereof as follows:

> "(8) Turning to the instant case, it is clear that Officer Tucker had the authority to stop the defendant's boat because it was carrying an expired commercial boat registration in violation of Section 371.051(7), Florida Statutes (1975). Such power, however, did not carry with it the automatic authority for Officer Tucker to conduct a general search of defendant's boat. Hill v. State, 238 So.2d 608 (Fla. 1970). Yet that is exactly what Officer Tucker proceeded to accomplish in this case under the guise of consent.
>
> (9) The officer's purpose in boarding the boat, as he testified, was to determine if the boat contained undersized lobsters as previously suspected. Upon boarding, he politely, but firmly proceeded to question the defendant with respect thereto without any mention of the expired boat registration. And while doing so, he looked into the icebox cooler on the deck of the boat searching the cooler for undersized lobsters. Officer Tucker correctly admitted to the court that he exceeded his authority in conducting such a search. Almost immediately thereafter, he pointed to the hold in the boat and asked if he could look therein. The defendant acquiesced by opening the hatch without saying a word. Under these circumstances, it is our view that the defendant's silent consent was tainted by the prior illegal search of the icebox cooler and therefore represents an acquiesc-

ence to authority rather than a free and voluntary consent to search. The defendant testified that he thought that the officer had a right to look in the hold, a not unreasonable belief since the officer had just prior thereto asserted his right to search the cooler without a search warrant and without obtaining the defendant's permission. The fact that the prior illegal search yielded no contraband in no way dissipates the admitted illegality of such search nor its obvious coercive effect on the defendant.

The trial Judge based his ruling in part on the fact that the defendant was friendly to Officer Tucker during the boarding and search of the boat, that the defendant had at least one other campanion on board, and that there were guns stored elsewhere in the boat. These are certainly relevant considerations in examining the issue of voluntariness based on the totality of the circumstances. They are, however, insufficient in our view to break the chain of serious illegality set in motion by the officer's admitted prior illegal search of the icebox cooler. Implicit with that action, Officer Tucker was asserting his right to search hidden areas on the boat without probable cause and without a search warrant, an authority he clearly did not have."

The incriminating contraband and admissions acquired as a result of the unlawful search cannot be admitted into evidence because of Article I, § 12 of the Florida Constitution and should not be admitted into evidence because it was obtained in clear violation of the Fourth Amendment to the United States Constitution.

CONCLUSION

The stopping of the San Raffael was unreasonable as reasoned by the Court in *Delaware* v. *Prouse*. The search that followed was prohibited by *Florida Statute 371.58* which prohibition the State of Florida has recognized in

its Court decisions. *Taylor* v. *State*, 355 So.2nd 180 (1978); *Tingley* v. *Brown*, 380 So.2nd 1289 (Fla. 1980). The Defendants did not consent to the search of their vessel as was clearly indicated when they asked Officer Soli if she had a search warrant. *Villari* v. *State*, 372 So.2nd 522 (1979). The defendants subsequent opening of the forward hatch did not constitute consent since they were mislead by the Marine Patrol Officer to believe that such a search warrant was not needed for the search. *Taylor* v. *State*, 355 So.2nd 180 (Fla. 1978); *Bumper* v. *North Carolina*, 391 U.S. 543 (1968). The assertion by the Marine Patrol Officer that they were under arrest for not having registration papers, when none were necessary, was a coercive effort to gain entrance into the forward hold. Without any break in the casual connection between the illegal stopping of the vessel, the illegal search of the vessel and the illegal arrest of the Defendants, statements were made by the Defendants which were incriminating. These statements together with the contraband should be suppressed and not admitted into evidence. *Article I § 12 of the Florida Constitution; Miranda* v. *Arizona*, 384 U.S. 436; *Brown* v. *Illinois*, 422 U.S. 590; *Dunaway* v. *New York*, 442 U.S. 200.

The Supreme Court of Florida in deciding that the search of the San Raffael was unreasonable in that it was not based on probable cause approved the Third District Court's reversal of the conviction. The Supreme Court of Florida in examining the questions with reference to the search applied Florida cases and a Florida Statute. While dual grounds for its decision in this regard undoubtedly existed, a somewhat unique legal proposition is presented in that Article I, § 12 of the Florida Constitution is broader in its scope in providing personal rights than the

Fourth Amendment to the Federal Constitution. Regardless of which Constitution is relied upon, the Judgement of the Supreme Court of Florida was correct.

Respectfully submitted,

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